Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HILARIO GONZALEZ-BALDERAS, SR.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

I.

Should the jury selection in a federal non-capital criminal trial be subjected to a lower standard of scrutiny than the jury selection in state capital cases?

II.

Does *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988), as applied here, misinterpret *Ross v. Oklahoma*, 487 U.S. 81 (1988)?

III.

Did the Court of Appeals err in finding a lack of bias in the peremptory challenge of a Hispanic-American venireman?

IV.

Did the Court of Appeals err in upholding the submission of a "seek the truth" instruction over timely objection?

V.

Does error in applying the Sentencing Guidelines merit remand if it may have affected the trial court's decision as to a downward departure?

LIST OF ALL PARTIES

1. Hilario Gonzalez-Balderas, Sr., Defendant-Petitioner.

2. The United States of America, Plaintiff-Respondent.

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PETITION FOR A WRIT OF CERTIORARI

TO THE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES OF AMERICA:

COMES NOW the petitioner, **Hilario Gonzalez-Balderas, Sr.,** by and through his counsel, George Michael DeGeurin, and pursuant to Rule 12, files this petition for writ of certiorari, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

The opinion of the Court of Appeals for the Fifth Circuit is published. ***United States v. Gonzalez-Balderas***, 11 F.3d 1218 (5th Cir. 1994). The full text of the opinion is reproduced in the Appendix, as is the order denying rehearing.

BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on January 4, 1994.

B. Both a petition for rehearing and a petition for rehearing en banc were filed. Each petition was denied without further opinion on January 31, 1994.

C. Petitioner asks this Court to review a final judgment of a court of appeals of the United States. Therefore this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

D. This petition is timely if filed on or before May 1, 1994.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation (emphasis added).

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, *the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (emphasis added).

STATEMENT OF THE CASE

A multiple-count indictment in the United States District Court for the Northern District of Texas accused the petitioner of violations of 21 U.S.C. §§ 841, 846, and 848, and 18 U.S.C. §371. A jury found the petitioner guilty in three counts. Following preparation of a presentence investigation report, and after hearing objections to the report, the trial court held that the offense level for the conviction in Count 121, based on §841 and §848, was 48, for which the United States Sentencing Commission Guidelines (hereinafter "Guidelines") prescribe a sentence of life imprisonment.[1] The conviction under §371 in Count

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[1] The trial court found the offense level for the §846 count was 46 and again applied a life sentence. The Court of Appeals later held that the conviction under §846 was barred by double jeopardy principles, 11 F.3d at 1225, but that does not affect the applicability of the issues presented herein to the other counts.

122 yielded an offense level of 40 and a resulting five year sentence. The trial court specifically declined to utilize a downward departure from the life sentence.

On appeal the issues raised by the petitioner included an objection to removal of a potential juror via the Government's challenge for cause. In rejecting that point of error, the Court of Appeals declined to apply the standard of scrutiny which this Court has applied in review of death penalty cases, holding that a less demanding standard should apply. 11 F.3d at 1222. The Court of Appeals also held that the petitioner's burden on appeal was to show that he had an objection to the jury actually seated, with the Court of Appeals relying on a prior decision which had interpreted *Ross v. Oklahoma*, 487 U.S. 81 (1988) as supporting such a rule.

The petitioner also complained of the Government's peremptory strike of a Hispanic-American venireman, but the Court of Appeals held that a sufficiently "neutral" explanation was given by the prosecutor. 11 F.3d at 1222-1223.

When the time came to instruct the jury, the petitioner timely objected to submission of an instruction that the jurors' duty was to "seek the truth." The Court of Appeals recognized that such language was not entirely consistent with the proper burden of proof but held that, given the context of the language, the charge was not erroneous. 11 F.3d at 1223.

The petitioner also contested the trial court's interpretation of the Sentencing Guidelines in several respects. The petitioner maintained that the proper offense level calculation for Count 121 was 43 rather than 48. While either 43 or 48 yields a life sentence if nothing other than the

Guidelines punishment grid is considered, the petitioner argued that the difference in actual offense levels producing that result could have affected the trial court's decision whether to grant a downward departure. The Court of Appeals held that the refusal of a downward departure was not reviewable unless the refusal was based on "assigned error," citing *Williams v. United States*, __ U.S. __, 112 S.Ct. 1112 (1992), and upheld the trial court's sentencing decision. 11 F.3d at 1225.

THE FEDERAL COURT JURISDICTION

The United States District Court had jurisdiction over the indictment, which accused the petitioner of violating 18 U.S.C. § 371 and 21 U.S.C. §§ 841, 846 and 848. The Court of Appeals had jurisdiction under 28 U.S.C. §1291 and Fed.R.App.P. 4(b).

REASONS FOR REVIEW

The writ of certiorari should be granted as to five issues decided against the petitioner by the Court of Appeals.

I.

REASONS FOR REVIEW OF QUESTION ONE

Should the jury selection in a federal non-capital criminal trial be subjected to a lower standard of scrutiny than the jury selection in state capital cases?

In the trial court and the Court of Appeals, the petitioner complained of the Government's exercise of a challenge for cause on venireman Wayne Green. The Court of Appeals upheld the trial court's decision. The principles of review urged by the petitioner were rejected by the Court

of Appeals in large part because of the petitioner's reliance on this Court's capital jurisprudence, although the petitioner cited other sources as well. The correctness of the Court of Appeals' analysis and the standard of appellate scrutiny which apply thus are intertwined, presenting a two-faceted issue of great importance.

Venireman Green indicated during voir dire that he had been prosecuted for a marijuana case, twelve years earlier, which had been "plea bargained ... down to a fine" (T. I-67). He mentioned that the FBI had been involved (T. I-88). The trial court further inquired whether "anything about that experience ... would affect" Green if he served on the jury, and Green replied:

> PANEL MEMBER: I been thinking about that. As it stands right now, I think I could give a fair judgment. There was somewhat [probably "some of what"] I consider to be entrapment in my experience, and if that were to come out in this case, I might be biased a little bit.
>
> THE COURT: If evidence of entrapment were to come out in this case?
>
> PANEL MEMBER: Yes, what I felt was entrapment.
>
> THE COURT: What is your definition of entrapment so we'll know what kind of evidence you are talking about?
>
> PANEL MEMBER: Well, in my case it was being shown forty thousand dollars and people will do a lot of things for forty thousand

dollars. To me that's entrapment when they come to you and you don't go to them, and that was my experience.

THE COURT: Mr. Raymond or Mr. May, do you have any further questions?

MR. RAYMOND [Prosecutor]: I would say that it seems to me that he was treated unfairly by the FBI.

THE COURT: Is that a fair statement of the way you feel?

PANEL MEMBER: I would say that about the entire situation, not only the FBI but mostly the Dallas police officers, Dallas and Richardson.[2] That's who -- The FBI treated me pretty good.

THE COURT: Okay. And they were not in the picture that long? ... I'm not sure myself which law enforcement agencies may be involved in the case we have before us here, but if any of those law enforcement agencies are involved -- the FBI, the City of Dallas Police, the City of Richardson Police -- do you think that your feelings about the way that you were treated in your experience would affect your ability to be impartial in this case?

PANEL MEMBER: It could to a certain degree to be honest with you. Right now

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[2] Richardson is a suburb of Dallas.

> from this proceedings [sic] I think I could be fair, but I don't know what's going to come out in court.
>
> THE COURT: Well, I don't know either, as I told everybody earlier.

Defense counsel then questioned Mr. Green:

> MR. DEGEURIN: ... If this case were an FBI case as opposed to local agency cases and if there is no entrapment issue that is raised in this case, do you feel like you could be fair and impartial to both sides?
>
> PANEL MEMBER: Yes, I do. If there is no entrapment (T. I-112).

Green had indicated at a different point that he had served on two Dallas County juries in the past two years (T. I-75). Given that, plus the statement that the only penalty was a fine, it is apparent that Green was not convicted of a felony.[3]

The Government nevertheless challenged Mr. Green for cause:

> MR. RAYMOND: Your Honor, I would move to strike both of them ... And Mr. Green appears to be as equivocal as some of the others that we have already struck.
>
> ...

---

[3] A felony would have disqualified Green from jury service in the Texas state district court. TEX. GOVT. CODE sect. 62.102.

> MR. DEGEURIN: I would oppose the challenge for cause by the government of Mr. Green.
>
> THE COURT: Well, I agree that I think Mr. Raymond has correctly characterized Mr. Green's statements as equivocal, but I also think he is correct that they are probably no more or less equivocal than the statements made by some of the other members of the panel. So out of an abundance of caution I am going to grant the government's motion to excuse Mr. Green, and we'll excuse him for cause (T. I-113).

There is no roster of grounds to challenge for cause in 28 U.S.C. §1870. A challenge for cause would be good as to an absolute disqualification, and it also may be granted in certain instances where bias could affect a venireman's deliberations if picked as a juror. That right does not arise upon the mere chance of bias, however. In any trial situation "where an adversary wishes to exclude a juror because of bias, ... it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981), reiterated language from *Swain v. Alabama*, 380 U.S. 202, 220 (1965) that "challenges for cause permit rejection of jurors on a narrowly specified, *provable* and legally cognizable basis of partiality" (emphasis added).

What is a moving party's burden of proof on a challenge for cause? As stated in *Darbin, supra* at 1113, the scope of challengeable bias is relatively narrow:

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> The challenge for cause is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror.

Where a party believes a venireman has "an unacknowledged or unconscious bias," a peremptory challenge, rather than a challenge for cause, is the correct remedy. *Id.*[4]

The trial court found that Mr. Green was equivocal, not that he was biased. Neither *Darbin* nor any other case the appellant can find lists "equivocation" *per se* as a valid basis for a challenge for cause. In the context of state capital cases heard on constitutional grounds, this Court has held that equivocation is not sufficient to establish a valid basis to challenge a venireman for cause. In *Adams v. Texas*, 448 U.S. 38 (1980), a juror's answer, in a Texas death penalty case, that he "thought" the death penalty would "affect his deliberations" was not a sufficient showing of bias against imposition of the death penalty to justify the State's challenge for cause. Later, in *Wainwright v. Witt, supra*, this Court disavowed the interpretation that a potential juror's bias must

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[4] *Darbin* relied on *Swain v. Alabama*, 380 U.S. 202, 220 (1965), which held:

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.

Swain was overruled as to the discretion of the prosecutor in using peremptory strikes against minority veniremen in *Batson v. Kentucky*, 476 U.S. 79 (1986), but the foregoing distinction made in *Swain* was not repudiated.

be "automatic" or must appear with "unmistakable clarity," 469 U.S., at 424, but that did not wholly undercut *Adams*. On the contrary, *Witt* maintained:

> The standard in this case is the easily understood one enunciated in *Adams*, which was whether a juror had a bias that "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, 469 U.S., at 433.

Witt drew the line at a point which still classifies the trial court's ruling here as erroneous:

> Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. *Witt, supra*, at 425.

That is *not* what the trial court found here. The judge only found that Mr. Green was equivocal, or "as equivocal" as some others who were excused by agreement. There is nothing in this record which conflicts with the presumption of a prospective juror's impartiality, as recognized in *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). None of the *Darbin* factors indicative of a "threat to impartiality" were present here.

Under the Sixth Amendment, the petitioner was entitled to be tried before a fair and impartial jury. When the Government is allowed to remove potential veniremen for "cause" on a basis which does not constitute proper cause for removal, the Government effectively is given a "bonus"

peremptory strike in the sense that the Government is "thereby afforded a broader exercise of its peremptory challenges." *United States v. Salamone*, 800 F.2d 1216, 1229 (3rd Cir. 1986). Error in the improper approval of even *one* challenge for cause by the prosecutor was held to be harmful, and hence constitute reversible error, in *Davis v. Georgia*, 429 U.S. 122, (1976). Although *Davis* was on review of a state death penalty case, its finding of harm was cited with approval in *Salamone, supra* at 1228, and its principle should apply here.

Relying on its earlier decision in *United States v. Prati*, 861 F.2d 82, 87 (5th Cir. 1988), the Court of Appeals largely avoided coming to grips with the foregoing observations by holding that the jury selection process in non-capital federal criminal cases is not subjected to the same level of scrutiny as is used in capital cases with respect to a venireman's opposition to the death penalty. 11 F.3d at 1222. The petitioner urges four reasons why this Court should grant the writ of certiorari in this cause and overrule *Prati* on that point:

1. *Prati* reached that conclusion in a footnote which followed a textual reference to a judicial ruling which was characterized as an "unintentional mistake," based in part on a lack of vigilance by defense counsel. Therefore any statement in *Prati*, in a footnote or otherwise, which would set precedent as to reasoned rulings by the trial court, such as the dismissal here, was beyond the scope of what needed to be decided in *Prati*.

2. The petitioner agrees with *Prati* that the severe consequences of capital cases call for a high degree of appellate scrutiny with respect to the voir dire process, but that in no way implies that non-capital jury selection is so unimportant that a more lax standard of review should apply.

Federal district courts ought to operate under the highest standards of fairness, particularly where the participation of citizens in the jury process is concerned.

3. In *Patton v. Yount*, 467 U.S. 1025 (1984), the punishment was life imprisonment (as it was in this cause). Yet in *Patton* this Court relied extensively on *Irvin v. Dowd*, *supra* in dealing with a jury selection issue.

4. At least one other federal circuit has looked to this Court's capital voir dire jurisprudence as precedent in non-capital criminal cases. *United States v. Salamone*, *supra* at 1226.

The *Prati* view that a cut-rate level of scrutiny suffices in federal criminal trials will continue to be applied in the Fifth Circuit because, as the Court of Appeals pointed out in this cause, one Fifth Circuit panel has no authority to overrule a prior panel's determination of an issue of law decided in the earlier case. The petitioner did all he could in the Fifth Circuit, asking for en banc rehearing as well as panel rehearing, but was unsuccessful.[5] The task of re-examining that conclusion in *Prati* falls to this Court.

Does the standard matter in this cause? The appellant thinks so. The petitioner does not dispute the general principle of deference to trial court discretion where that discretion is supported by the record, but the trial court's ruling was not clearly supported by the content of Green's

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[5] The petitioner's counsel did not represent Prati, and of course the petitioner himself was not in any way connected with Prati. The petitioner's counsel also has raised this matter in another petition for writ of certiorari in a Fifth Circuit case now pending before this Court, *Puig-Mir v. United States*, No. 93-1322.

answers. The Court of Appeals also never concluded that Green actually was biased, concluding only that "Green's prior conviction of a narcotics offense, albeit comparatively minor, posed substantial *potential* for bias in the trial of an accused narcotics trafficker." 11 F.3d at 1222 (emphasis added).[6] The petitioner does not even agree that a substantial potential bias was shown, but what matters at this point is that the Court of Appeals, like the trial court, appears to have rested its decision on resolution of equivocal or ambiguous evidence in favor of the proponent of the challenge, contrary to the rule in *Witt*. In light of these considerations, there is reason to believe that the Court of Appeals' choice of standard for review mattered in this cause, making this cause an appropriate vehicle for examining the correctness of *Prati* on this point.

II.

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[6] The Court of Appeals' opinion stated that Green had doubts about his impartiality. 11 F.3d at 1222. The petitioner thinks the record supports the opposite conclusion. Green clearly stated that he might carry a grudge against the Government *if* the evidence showed what he considered "entrapment," specifically defined by Green as the offer of money by government operatives to draw someone into criminal activity, but Green also stated that he would be fair to both sides if entrapment, according to his definition, was not involved. The prosecutors knew from the outset that this type of entrapment was not a factor in this case. Aligned against these explicit answers there is only the speculative notion that Green's experience as a small fish in a marijuana case would somehow make him unfair in a case allegedly involving a major wholesale supply line for imported cocaine.

REASONS FOR REVIEW OF QUESTION TWO
Does *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988), as applied here, misinterpret *Ross v. Oklahoma*, 487 U.S. 81 (1988)?

The Court of Appeals offered another reason for rejecting the petitioner's point of error concerning Mr. Green. Even if the trial court erred, the Court of Appeals reasoned, the petitioner failed to prove that he was harmed. For this conclusion the Court of Appeals again turned to its earlier decision in *United States v. Prati*, *supra*. The decision in *Prati* and the decision in this cause were erroneous because the rationale of *Prati* was a misinterpretation of this Court's decision in *Ross v. Oklahoma*, 487 U.S. 81 (1988).

In *Ross v. Oklahoma* the trial court denied a defense challenge for cause. As a result, Ross' counsel was forced to utilize a peremptory challenge to exclude that particular venireman. Because peremptory challenges are limited in number, the use of a peremptory challenge to "cure" trial court error in denying a challenge for cause can mean, if all other defense peremptories are exhausted, that the error in denying a challenge for cause shorts the defendant one peremptory challenge which he could have used to keep someone else off the jury panel. It was in that context that this Court concluded that Ross could not demonstrate harm unless he objected to the actual jury. Since criminal verdicts must be unanimous, it should have been enough for Ross to show a valid basis for objection to even one actual juror, but Ross failed to do that.[7] The loss of a peremptory challenge,

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[7] The Texas Court of Criminal Appeals applies a similar test, which requires a defendant who alleges error in denial of a challenge for cause to exhaust his peremptory challenges, unsuccessfully request additional peremptory challenges, and identify an "objectionable" juror or jurors

by itself, was considered an insufficient basis for reversal on constitutional grounds because the right to peremptory challenges was not of constitutional dimension.

Prati purported to apply *Ross v. Oklahoma*, but it involved an entirely different situation. To begin with, *Prati* involved a federal prosecution, a fact which should have avoided the concern in *Ross* as to whether a state's peremptory challenge provision was of constitutional dimension. Second, in *Prati* the Government was given the benefit of a challenge for cause against a venireman who should have been subject only to a peremptory challenge. The net effect was the equivalent of giving the Government an extra peremptory challenge, which in turn gave the Government a distinct advantage in tailoring the jury to its liking. *Prati* nevertheless held that Prati had to show that the actual jury was objectionable. In this *Prati* erred.

Unlike the consumption of a defense peremptory challenge, which was the issue in *Ross*, the evil in *Prati* and the evil in this cause cannot possibly be cured by either (a) requesting additional defense peremptory challenges or (b) identifying some other potential juror as being subject to challenge for cause or being "objectionable." In fact there is nothing a defendant can do to cure it, for once excluded the potential juror is gone. The harm lies in allowing the Government to bend the rules in excluding potential jurors it does not want but the defendant does want. The defendant is denied an equal opportunity to participate in selecting the jury which will decide his fate. Thus *Prati* was incorrect in taking the harmless error principle from *Ross* and applying it in a significantly different context. It may be that this type of error can occur and the remaining jurors still will

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seated as a result. *See Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986), *cert. denied* 482 U.S. 920 (1987).

constitute an "impartial jury" for purposes of U.S. CONST. amend. VI, but the process prescribed for jury selection nevertheless has been altered to give the Government an improper advantage.

III.

REASONS FOR REVIEW OF QUESTION THREE
Did the Court of Appeals err in finding a lack of bias in the peremptory challenge of a Hispanic-American venireman?

The Court of Appeals also rejected the petitioner's contention that the Government used a peremptory challenge against venireman Rudolfo Serna, a Hispanic-American citizen, on the basis of improper ethnic discrimination. In so doing, the Court of Appeals failed to enforce the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 499 U.S. __, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), in that the Court of Appeals accepted as a "neutral" rationale an explanation which was at odds with reality and, if anything, tended to indicate that ethnic stereotyping did affect the prosecutor's reasoning.

Notwithstanding the shorthand reference to "*Batson*" by both parties and by the trial court, *Batson* is only one prong of a two-pronged restriction on the Government's use of peremptory challenges. *Batson* was aimed at upholding a state court defendant's rights under amend. XIV, but its doctrine was incorporated into federal caselaw via U.S. CONST. amend. V, applicable to federal prosecutions. *United States v. Forbes*, 816 F.2d 1006, 1009, n. 6 (5th Cir. 1987); *United States v. Clemons*, 941 F.2d 321, 323 (5th Cir. 1991). The *Batson* concept extends to peremptory challenges which appear to discriminate on the basis of recognizably distinct ethnicity, such as Hispanic ethnicity.

The second prong of the restriction on peremptory challenges was put in place by *Powers v. Ohio*, *supra*. There this Court held that it was not necessary for the defendant to be a member of the same racial or ethnic group as the venireman who was struck peremptorily. The rationale of *Powers* was that minority venire members have their own constitutionally protected interests in jury service, and a criminal defendant has standing to protect that interest by urging a *Batson* objection to the prosecution's racially-motivated use of a peremptory challenge. Presumably *Powers* also presumably applies in federal prosecutions.

Venireman Serna indicated he originally was from the Rio Grande Valley area of Texas. When the peremptory strike of Mr. Serna was timely contested by the petitioner, the prosecutor pointed to the fact that Mr. Serna stated that he has two brothers-in-law in Pharr, Texas who were police officers (T. I-90, 113-116). According to the prosecutor, this alarmed a DEA agent assisting him who "is aware that there is a person, a relative with the last name of Serna who the FBI has a criminal complaint outstanding against in that area" (T. I-113-114). Asked if he knew whether he was related to Marcus David Serna of Pharr (the purported rogue officer), Rudolfo Serna said he did not know, "but my relatives are in Edinburg, Texas" (T. I-116). It is obvious, however, that Marcus David Serna was not one of the brothers-in-law, as a brother-in-law would not have the same surname.

Perhaps because it was too obvious that the specter of Marcus David Serna was a ploy, the prosecutor also asserted that there was widespread corruption among South Texas police officers. There was not a shred of proof, however, to indicate that venireman Serna's brothers-in-law were corrupt. The prosecutor could have, but did not, ask Serna about that.

In the United States it generally is not presumed that persons are guilty, and it certainly is not presumed that police officers are corrupt.[8] The prosecutor expressed concern that evidence of police corruption by other South Texas officers might be taken the wrong way by Serna, but he asked Serna no questions to establish any factual basis for that. It is just as likely that Serna would have been incensed against the petitioner by evidence of attempts to corrupt the police.[9] Furthermore, the prosecutor's supposedly "neutral" explanation in fact indicated that the prosecutor probably was resorting to ethnic stereotypes, in that he generalized about persons in an area with a heavily Hispanic-American population. To put this in perspective for Northern readers, what the prosecutor urged was equivalent to saying a venireman who hailed from northeast Washington, D.C., Harlem, or Chicago's south side was excludable on "racially neutral" grounds if he had relatives in public service back home. Such stereotyping is improper. *Georgia v. McCollum*, __ U.S. __, 112 S.Ct. 2348, 2358, 120 L.Ed.2d 33 (1992).

This Court cannot be the final arbiter of every application of *Batson* and *Powers* in this country, but what is special about this cause is the extent to which a suspect generalization made about a relative of the venireman -- not even the venireman himself -- was accepted at face value. As future Fifth Circuit precedent unless this Court deals with the matter, the decision herein opens vast new avenues for sharp practices which could deprive *Batson* and *Powers* of much of their force.

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[8] The prosecutor did not even offer genuine extrinsic evidence of such corruption in South Texas.

[9] Actually the "corruption" evidence at trial was evidence of an undercover officer who pretended to be corrupt in order to infiltrate the alleged conspiracy.

Nor can it be said that the error was harmless. There were reasons why the loss of Serna as a potential juror could harm the petitioner, as articulated in the trial court. The Court of Appeals further noted that there were two other Hispanic jurors, but in fact one of those, Mr. Florez, was replaced by an alternate juror after it was disclosed that an assistant to the prosecutors was a relative of Mr. Florez. The harm in tolerating this type of peremptory challenge goes far beyond the impact in one case, however. Maintaining the vitality of *Batson* and *Powers* is important, not only for defendants, but for jurors and the overall integrity of the judicial system as well. To explain the harm flowing from the Government's misuse of the peremptory challenge here, the appellant cannot improve on the observation in *Pemberty v. Beyer*, 800 F.Supp. 144, 168 (D.N.J. 1992):

> Although they clearly serve a useful purpose ..., [peremptory challenges] also provide a means of skewing random jury selection, insulting those who are discharged without reason or explanation, and a vehicle for promoting discrimination in an institution dedicated to its destruction.

A United States district court should be the last place on earth that racial stereotyping is countenanced.

IV.

REASONS FOR REVIEW OF QUESTION FOUR

Did the Court of Appeals err in upholding the submission of a "seek the truth" instruction over timely objection?

The petitioner timely but unsuccessfully objected to a portion of the trial court's instructions to the jury, wherein the court told the jurors that their "sole interest" was to "seek the truth." The Court of Appeals was partly sympathetic to the petitioner's complaint, noting that "seeking the truth" was more in harmony with a "preponderance of evidence" burden of proof than with a "beyond a reasonable doubt" burden of proof. The Court of Appeals nevertheless found the instruction was "not erroneous under the standard of plenary review accorded when, as here, an objection is properly preserved." *Id.* at 1223. The Court of Appeals' reasoning, however, seemed more like a harmless error analysis:

> There is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to "seeking the truth," rendered as it was in the context of an admonition to "not give up your honest beliefs," modified the reasonable doubt burden of proof. 11 F.3d at 1223.

Having so found in this cause, the Court of Appeals nevertheless suggested that "trial courts, in an abundance of caution, may wish to delete [the "seek the truth" language] from their instructions." *Id.*

This Court has never had occasion to decide whether a "seek the truth" instruction is error, let alone harmless error, when given over timely objection. Recently this Court denied a writ of certiorari in a case where the issue was presented in the "plain error" context, ***Mendez-Villarreal v. United States***, __ U.S. __, 114 S.Ct. 696 (1994). Where an objection is made, however, the issue merits closer scrutiny.

The Court of Appeals assumed that the "seek the truth" language did not undercut the burden of proof language because it appeared in a different portion of the charge. Again, that seems more like a harmless error analysis, and the confusion in the Court of Appeals' approach is itself a good reason for reviewing this question. On the merits, there are at least three flaws in the Court of Appeals' reasoning.

First, though spatially separated in the charge, both the abstract burden of proof language and the "seek the truth" language addressed the goal of the deliberations, though giving different signals. The Court of Appeals noted that the "seek the truth" language was "at the end of the charge," but if anything that might give it more prominence, as if it were the ultimate conclusion or "bottom line" as to the jury's responsibility.

Second, how could the Court of Appeals know how the jury actually viewed the interaction between different portions of the charge?

Third, the Court of Appeals failed to take into account what the petitioner calls the "Lazarus factor." If jurors agreed that the evidence did not establish guilt beyond a reasonable doubt, the foreperson should sign the "not guilty" verdict form. A further assignment to "seek the truth" creates the risk that, even at that point, the Government's case could revive like Lazarus as jurors carried on with their deliberations to determine the "truth." The jurors might eventually conclude that they could not unanimously agree on any explanation for the "truth" other than the Government's hypothesis. The Government's case, moribund on its own terms, could be accepted simply because it seemed more plausible than anything else, given the evidence before the jury.

The risk of such a thing occurring seems particularly great where, as here, the evidence ranges far and wide over diverse manifestations of a purported conspiracy and the Government's case relies on a large measure of inference as to the links of the accused to the activities of others. Further, although much was made of recorded conversations involving the petitioner, the Government relied largely on inference and on characterization by others as to what the petitioner was speaking about. That the quantity of evidence was voluminous does not alter the highly circumstantial quality of much of the Government's evidence with respect to the petitioner's culpability. This Court should hold that the "seek the truth" language is error if given over objection and that there was an unacceptable risk that it was harmful.

V.

REASONS FOR REVIEW OF QUESTION FIVE

Does error in applying the Sentencing Guidelines merit remand if it may have affected the trial court's decision as to a downward departure?

The petitioner also contended that the trial court erred at the sentencing phase of the trial by accepting certain Presentence Report calculations which were controverted. The Presentence Report found the total adjusted offense level to be 48, based on the dictates of U.S.S.G. §3D1.3 that "the offense guideline that produces the highest offense level is to be applied." Accordingly, 48 was applied because the Count 121 calculation produced a 48, in contrast to a 46 for Count 1 and a 40 for Count 122. In the Court of Appeals the petitioner discussed four controverted items -- attribution of the full conspiracy's quantity of cocaine to the petitioner in the base offense calculation, a two-point weapons enhancement under U.S.S.G. §2D1.1(b)(1), a four-point

increase under U.S.S.G. §3B1.1 for management role, and the petitioner's criminal history category. The Court of Appeals discussed the base level calculation and the criminal history category, finding that a properly attributable amount still yielded a base offense level of 40 for either Category I or Category II. The Court of Appeals also implicitly recognized that the proper managerial adjustment was a three-point, not four-point, increase. The weapon factor was not discussed, but the Court of Appeals seems to have assumed *arguendo* that the petitioner was correct and proceeded to address the petitioner's claim of harm on the basis of a 43 level.

The petitioner maintained that there potentially was a difference between a 43 achieved by virtue of U.S.S.G., ch. 5, Applic. Note 2, as occurred in the trial court, and a 43 achieved because that was the full score. The petitioner requested a downward departure, i.e. an exercise of judicial discretion, as permitted by U.S.S.G. §5K2.0. The petitioner urged consideration of a number of factors, including (a) the substantially lighter punishment received by all other defendants, (b) the petitioner's inability to cooperate in a correspondingly meaningful way, (c) the petitioner's age, and (d) the devastating impact a life sentence would have on the petitioner's family.

The petitioner contended in the Court of Appeals that the sentencing court might have perceived a difference between a real 43 and a nominal 43 which actually was an "off the scale" 48, such that the trial court might have been more receptive to a downward departure in the former instance. The Court of Appeals focused on the trial court's policy view that making an example out of the petitioner merited a life sentence, 11 F.3d at 1225, but that emphasis on deterrence also may have been affected by erroneous

conclusions as to the additional factors, criminal history, and quantity of contraband.

What makes this issue of particular importance to this Court is the Court of Appeals' final observation on this topic: "Because the refusal to depart did not result from an assigned error, it could not warrant reversal of the sentence." That language was cryptic, but since the statement cited *Williams v. United States*, __ U.S. __, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), the petitioner takes it to invoke the principle in *Williams* that "remand is required only if the sentence was 'imposed *as a result of* an incorrect application' of the Guidelines." *Williams*, 112 S.Ct. at 1120 (emphasis in original). This cause calls upon the Court to flesh out the meaning of an erroneous "result" under *Williams*.

Williams, supra stated that the "result" standard was met "when the error results in the district court selecting a sentence from the wrong guideline range," but *Williams* did not hold that this was the only way an incorrect result could be shown. The petitioner believes a wrong result also is shown if there is reason to believe that the discretionary aspect of sentencing was influenced by one or more errors in the Guidelines calculation. That is especially true where, as here, the prescribed "range" on the Guidelines grid chosen by the trial court consists of only one sentence, i.e. life imprisonment. This Court did not have occasion in *Williams* to consider this aspect of the issue of erroneous results under the Guidelines. It is of critical importance here.

Williams, supra observed that "a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." Yet *Williams* stated two sentences later that an appellant need not show "that the invalid factor was determinative," and this Court concluded that a remand is

appropriate if a misapplication of the Guidelines is shown. That also should be the case if there is doubt as to whether the discretionary aspect of sentencing is affected by error in the trial court's Guidelines calculation. Although this Court has not addressed that question, the petitioner's position is supported by a very recent Texas appellate decision, *Turk v. State*, 867 S.W.2d 883 (Tex. App. -- Houston [1st Dist.] 1993, *pet. filed on other grounds*). *Turk* considered sentencing error, namely error in basing a sentence on prior convictions not actually found, under a legislative scheme which gave the trial court discretion above a certain fixed minimum determined by proof of prior convictions. The Guidelines are similar in the sense that the starting point of the sentencing decision is fixed once certain factual determinations are made, though the Guidelines system is more refined than the Texas statutory punishment system at issue in *Turk*. In *Turk* the trial judge even commented at a posttrial hearing that he thought the same punishment was merited regardless of the statutorily-fixed minimum, but the appellate court declined to assume that the punishment decision actually was not affected by the statutorily-determined starting point for the punishment range, and the case was remanded for a new punishment determination.

Like the *Turk* court, this cause should resolve any doubt as to what the trial court would do by ordering a remand. Sentencing is, after all, a trial court function. This is a very appropriate case for addressing this issue, in that the next level down from 43 would allow a sentence as "light" as thirty years. The petitioner thinks it is quite possible that the trial court would have been reluctant to let the remainder of a man's life depend on a one-point difference in the Sentencing Tables. If the petitioner is wrong about that, it would be easy enough for the trial court to show that upon a remand, but there is less reason to think a remand is pointless here than in *Turk, supra*. If the

petitioner is right, it would be tragic to deny the trial court an opportunity to reconsider.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari in this cause.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Hilario GONZALEZ-BALDERAS, Sr.,
Defendant-Appellant.

No. 92-1482.

United States Court of Appeals,
Fifth Circuit.

Jan. 4, 1994.

Appeal from the United States District
Court for the Northern District of Texas

Before POLITZ, Chief Judge,
HIGGINBOTHAM, Circuit Judge, and
DAVIDSON,* District Judge.

POLITZ, Chief Judge:

Hilario Gonzalez-Balderas, Sr. appeals his convictions of narcotics offenses and life imprisonment sentences. We affirm in all respects except as to one conspiracy count and concurrent sentence.

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* District Judge of the Northern District of Mississippi, sitting by designation.

Background

Gonzalez-Balderas was indicted with 41 others for his role in a cocaine distribution operation that reached from Colombia to Matamoros, Mexico to New York City. He was in charge of the distribution of cocaine in Houston, facilitated the shipment of cocaine to other locales, and was responsible for the funnelling of cocaine profits back to the top echelon of the organization in Matamoros. A jury convicted him of conspiring to possess more than five kilograms of cocaine with intent to distribute in violation of 21 U.S.C. § 846, engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, and conspiring to transport funds out of the United States to promote an unlawful activity in contravention of 18 U.S.C. § 371. The district court imposed sentences of life imprisonment on each of the Title 21 counts and a five-year sentence for the § 371 conspiracy conviction, all to run concurrently. This appeal timely followed.

Analysis

Gonzalez-Balderas assigns numerous errors which we address in turn.

1. Government challenge for cause.

Gonzalez-Balderas contends that the district court erred in granting the government's challenge for cause of prospective juror Wayne Green. Green admitted to a conviction for possession of marihuana. His voir dire examination included the following:

> The Court: Is there anything about that experience that you think would affect you should you be selected to serve as a juror [in] this case?

Green: I been thinking about that. As it stands right now, I think I could give a fair judgment. There was somewhat what I consider to be entrapment in my experience, and if that were to come out in this case, I might be biased a little bit.

. . . .

The Court: What is your definition of entrapment so we'll know what kind of evidence you are talking about?
Green: Well, in my case it was being shown forty thousand dollars and people will do a lot of things for forty thousand dollars. To me that's entrapment when they come to you and you don't go to them, and that was my experience.

. . . .

Government: I would say that it seems to me that he was treated unfairly by the FBI.
The Court: Is that a fair statement of the way you feel?
Green: I would say that about the entire situation, not only the FBI but mostly the Dallas police officers, Dallas and Richardson. That's who—The FBI treated me pretty good.
The Court: Okay. And they were not in the picture that long?
[no response]
The Court: I'm not sure myself which law enforcement agencies may be involved in the case before us here, but if any of those law enforcement agencies are involved—the FBI, the City of Dallas police, the City of Richardson police—do you think that your feelings about the way that you were treated

> in your experience would affect your ability to be impartial in this case?
> Green: It could to a certain degree to be honest with you. Right now from these proceedings I think I could be fair, but I don't know what's going to come out in court.

. . . .

> Defense Counsel: If this case were an FBI case as opposed to a local agency case and if there is no entrapment issue that is raised in this case, do you feel like you could be fair and impartial to both sides?
> Green: Yes, I do. If there is no entrapment.

We afford wide latitude to the trial court in determining the impartiality of a potential juror and reverse only for an abuse of discretion. We have only the cold record before us; the trial court had the opportunity to observe the voice and demeanor of the person in determining what he really was saying and in assessing his credibility.[1] We perceive no reason to disturb the trial court's assessment herein. Green's prior conviction of a narcotics offense, albeit comparatively minor, posed substantial potential for bias in the trial of an accused narcotics trafficker.[2] Indeed, Green admitted to such doubts about his impartiality. The combination of objective grounds for bias and subjective doubts of impartiality entitled the trial court to discount Green's conditional affirmation that he could be fair. Gonzalez-Balderas's reliance on jurisprudence concerning

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[1] *United States v. Hinojosa*, 958 F.2d 624 (5th Cir. 1992).

[2] *See United States v. Jones*, 712 F.2d 115 (5th Cir. 1983).

excuse of *Witherspoon*[3] jurors in capital cases is misplaced. In death penalty cases removal of a potential juror on the basis of opposition to the death penalty is subject to heightened scrutiny.[4]

In any event, Gonzalez-Balderas does not contest the impartiality of the panel that actually judged his case. This is fatal to his objection. We held in *Prati* that improper removal of a member of the venire is not grounds for reversal in a non-capital case unless the jurors who actually sat were not impartial within the meaning of the sixth amendment. Gonzalez-Balderas argues that this rule should be limited to improper denial of a defendant's challenges. *Prati*, however, was not so limited; it was an appeal of the grant of a government challenge for cause, as here. We may not ignore the decision of a prior panel absent an intervening Supreme Court ruling, legislation, or a decision by this court sitting en banc. This assignment of error is rejected.

2. *Batson* objection.

There were three Hispanic Americans on the venire; the government struck one with a peremptory challenge. Gonzalez-Balderas contends that it did so for racial reasons in contravention of *Batson v. Kentucky*.[5] Proceeding directly to the ultimate question of discrimination *vel*

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[3] *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[4] *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988).

[5] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.69 (1986).

non,[6] we agree with the district court that the government proffered a race-neutral reason for its challenge, the force of which Gonzalez-Balderas did not overcome.

The person excused, Rudolfo Serna, testified that he had two relatives who were police officers in the Rio Grande Valley. The prosecuting attorney explained that police corruption associated with cocaine traffic across the border is epidemic in that area. Because he anticipated that testimony on this subject might be presented at trial, the prosecutor feared potential bias. We find this explanation more than adequate to dispel any inference of discrimination, particularly in light of the fact that the government did not strike either of the two other potential jurors of Hispanic descent.

3. "Seek the truth" jury charge.

In its closing instruction to the jury on the duty to deliberate, the court explained:

> To reach a verdict, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.
>
> It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During

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[6] *United States v. Pofahl*, 990 F.2d 1456 (5th Cir.) *cert. denied*, —U.S.—, 114 S.Ct. 266, 126 L.Ed.2d 218 and — U.S. —, 114 S.Ct. 560, 126 L.Ed.2d 460 (1993).

> your deliberations, do not hesitate to re-examine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> Remember, at all times, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

Gonzalez-Balderas contends that instructing the jury that its "sole interest is to seek the truth" dilutes the reasonable doubt standard of proof.

As an abstract concept, "seeking the truth" suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt.[7] The district court, however, did not use it in this way. Rather, the trial court began its instructions with a clear definition of the government's burden of proof in which it repeatedly stated that the defendant could not be convicted unless the jury found that the government had proven him guilty beyond a reasonable doubt. It correctly defined proof beyond a reasonable doubt as "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." There

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[7] *Cf. Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to "seeking the truth," rendered as it was in the context of an admonition to "not give up your honest beliefs," modified the reasonable doubt burden of proof.[8]

We found no plain error in such a charge in *United States v. Winn*,[9] where the defendant did not timely object. We now hold that the charge is not erroneous under the standard of plenary review accorded when, as here, an objection is properly preserved. Nevertheless, although the sentence is taken from the Fifth Circuit Pattern Jury Instructions,[10] trial courts, in an abundance of caution, may wish to delete it from their instructions.[11]

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[8] *See Estelle v. McGuire* — U.S. —.112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (reaffirming that the standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution).

[9] 948 F.2d 145 (5th Cir. 1991), *cert. denied*, — U.S. —, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992).

[10] Fifth Circuit Pattern Jury Instructions (Criminal), No. 1.25 (1990).

[11] The charge as given differs somewhat from the pattern instruction, which suggests a sentence stating: "Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt."—The additional clause —"to decide whether the government has proved the defendant guilty beyond a reasonable doubt."—cuts both ways. On the one hand, by repeating that the jury must find guilt beyond a reasonable doubt, it arguably reaffirms the government's burden of proof. On the other hand, the juxtaposition of "seeking the truth" and "guilt beyond a reasonable doubt" arguably conflates the two concepts.

4. Coconspirator statements.

Gonzalez-Balderas contends that the district court erred by admitting statements of his coconspirators without either a prior finding that the statements were admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence[12] or a finding that a prior determination was impractical. His challenge is foreclosed by circuit precedent.

In *James* we held that the district court should require the government to establish a Rule 801(d)(2)(E) predicate before admitting coconspirator statements, unless the court finds that order of proof impractical. In that event, the court may conditionally admit the statement subject to a subsequent final determination.[13] We have approved deferral of a *James* ruling until the close of the government's case.[14] If the district court finds the statements to be admissible, the defendant suffers no prejudice from the order of proof.[15] Here, the district court made its *James* ruling at the close of the government's case, finding the requisite foundation. Gonzalez-Balderas has not shown that the district court abused its discretion in deferring its ruling. Regardless, if the court's substantive finding was correct, he suffered no

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[12]Under Fed.R.Evid. 801(d)(2)(E) statements by coconspirators are admissible as nonhearsay if the government proves that a conspiracy existed, that the declarant and the defendant were members and that the statement was made during the course of and in furtherance of the conspiracy. *United States v. James*, 590 F.2d 575 (5th Cir.)(en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979).

[13] *James; United States v. Fragosa*, 978 F.2d 896 (5th Cir. 1992), *cert. denied*, —U.S. —, 113 S.Ct. 1664, 123 L.Ed.2d 282 (1993).

[14] *Fragoso.*

[15] *James.*

prejudice from the delay. Similarly nonprejudicial was the omission of an express finding that an earlier determination was not reasonabley practical. It matters not whether the final decision as to the admissibility of the statements could have been made earlier if the decision to admit them ultimately was correct. Gonzalez-Balderas, however, contests the decision to admit statements he says were made before he joined the conspiracy. This argument misperceives the law. We have held that the fact that the challenged statement was made before the defendant joined the conspiracy is "of no consequence,"[16] provided that "there was evidence of [the defendant's] subsequent knowledge and willingness to participate in the conspiracy." [17] There was such evidence herein. Gonzalez-Balderas asks us to disregard our precedent; even if we were so inclined, we could not do so.

5. Transcripts.

The government introduced into evidence several Spanish language tape recordings with English language transcripts. The government played the tape recordings to the jury and the sponsoring witness identified the voices. In some instances, however, the government played only part of the tape recordings. Gonzalez-Balderas objects to admission of those portions of the transcripts accompanying the parts of the tapes that were not played, arguing that the voices were not identified.

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[16] *United States v. Osgood*, 794 F.2d 1087, 1093 (5th Cir.) *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

[17] *United States v. Rocha*, 916 F.2d 219, 240 (5th Cir. 1990) *cert. denied*, —U.S. —, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991).

As the trial court observed, the jury was capable of listening to the entirety of the tape recordings and deciding whether the voices changed. If the voices changed and the transcript did not so reflect, the jury was bound by its instructions to disregard the transcript. After the government authenticated the transcripts as accurate renditions of the audio recordings, it was incumbent on Gonzalez-Balderas to raise any specific objections that he may have had to the identification of a particular speaker.[18] He did not do so and will not be heard to complain now.

6. Sentencing.

The district court sentenced Gonzalez-Balderas to life imprisonment for each of his convictions under 21 U.S.C. § 846 and § 848, as prescribed by the Sentencing Guidelines. Gonzalez-Balderas challenges several of the underlying calculations. Even if he were correct, the sentence prescribed by Guidelines would not change.

Gonzalez-Balderas contends that the entire 13,600 kilograms of cocaine seized from the enterprise cannot be attributed to him. The evidence adduced at trial, however, established that six shipments of cocaine, consisting of 600 to 650 kilograms, were delivered to Gonzalez-Balderas. Whether 13,600 kilograms or 3,600 kilograms are used, the base offense level under the § 2D1.1 Drug Quantity Table is 42. U.S.S.G. § 2d1.5, the guideline for 21 U.S.C. § 848 convictions, mandates the addition of 4 levels, resulting in a base offense level of 46. The maximum offense level on the Guideline grid is 43, directing a sentence of life imprisonment whether the defendant's criminal history category is I, as Gonzalez-Balderas urges, or II, as the

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[18] *United States v. Armendariz-Mata*, 949 F.2d 151 (5th Cir. 1991), *cert. denied*, —U.S. —, 112 S.Ct. 2288, 119 L.Ed.2d 212 (1992).

district court found. Regardless of the disposition of Gonzalez-Balderas' objections to the additional enhancements,[19] his guidelines sentence is life imprisonment.

Gonzalez-Balderas, however, contends that the district court might have granted his request for a downward departure had his offense lever been lower. We are not persuaded. The district court considered a life sentence necessary as a deterrent in light of the vast profits that Gonzales-Balderas stood to gain in his role as a middle manager in a large-scale enterprise. Because the refusal to depart did not result from an assigned error, it could not warrant reversal of the sentence.[20]

7. Double jeopardy.

Finally, Gonzalez-Balderas contends that a conspiracy in violation of 21 U.S.C. § 846 is a lesser-included offense of a § 848 continuing criminal enterprise. The government concedes that he is correct. The double jeopardy clause therefore requires that we vacate the conviction and sentence under Count 1 of the indictment.[21]

The conviction and sentence for conspiracy to possess cocaine with intent to distribute under Count 1 are VACATED. The convictions and sentences under Counts 121 and 122 of the indictment are AFFIRMED.

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[19] Gonzalez-Balderas challenges the two-level adjustment for presence of a firearm and maintains that the enhancement for his role in the conspiracy should have been three levels rather than four.

[20] *Williams v. United States*, — U.S. —, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992).

[21] *United States v. Devine*, 934 F.2d 1325 (5th Cir. 1991), *cert. denied*, — U.S. —, —, —, —, —, —, 112 S.Ct. 349, 911, 952, 954, 1164, 1197, 116 L.Ed.2d 288, 811, 117 L.Ed.2d 120, 121, 411, 437 (1992).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 31, 1994
CHARLES R. FULBRUGE III
CLERK

No. 92-1482

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HILARIO GONZALEZ-BALDERAS, SR., a/k/a Hilario Perez, a/k/a Mr. Perez,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(opinion 1/4/94, 5 cir., 1994 F. 3d)
(January 31, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and DAVIDSON, * District Judge

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the court

having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not voting in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it , rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ HENRY A. POLITZ
Chief Judge

* District Judge of the Northern District of Mississippi, sitting by designation